Supreme Court, U. S.
FILED
SEP 27 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-176.

FRANK A. HALL,
PETITIONER,
v.
JAMES DiMARZO ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondents in Opposition.

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Brief of Respondents in Opposition.

Opinions Below.

The respondents accept the statement of the petitioner.

Jurisdiction.

The respondents accept the statement of the petitioner.

Questions Presented.

1. Should this Court grant certiorari to review the question whether the petitioner, a state commissioner of correction who is required by Massachusetts law to inspect all county institutions in the state at least semi-annually, to issue minimum standards of care and custody for all persons confined thereto, and to seek compliance with these standards pursuant to specific statutory enforcement procedures, is a proper defendant in this case challenging conditions and practices in one of those county institutions?

2. Should this Court grant certiorari to review the question whether the courts below erred in their decisions concerning fire safety and out-of-cell time, when those decisions remedied constitutional violations which were conceded by Essex officials, which the courts below found served no legitimate purpose, and which Essex officials expressed a willingness to remedy?

Statement of the Case.

A. Prior Proceedings.

This case was filed in the district court as a class action on behalf of all persons who are or will be inmates at the Essex County Jail and House of Correction in Salem, Massachusetts [hereafter Essex]. The inmates brought suit pursuant to 42 U.S.C. §1983, seeking declaratory and injunctive relief against numerous unconstitutional conditions and practices. Named as defendants in the case were the Essex county commissioners, sheriff and deputy master of the institution, and the petitioner, the Massachusetts commissioner of correction. In a motion for a preliminary injunction, the plaintiffs requested equitable relief against specific constitutional violations in the

areas of fire safety, health, sanitation and out-of-cell time for persons awaiting trial (A-2).[1] After a hearing and a personal tour and examination of Essex, the district judge found the institution to fall below minimum constitutional standards.

The district court issued a modest injunction directing certain changes to bring Essex within constitutional bounds. Specific fire safety measures and improvements in sanitation were ordered (A-14-15). Windows were ordered framed and glazed with clear glass (A-14). An increase in staff was mandated both for fire safety and to allow detainees substantially the same time out of their cells as sentenced prisoners (A-13).

The petitioner did not request a stay of the district court's order, but appealed certain provisions of that order to the court of appeals.[2] In addition, he challenged the failure of the district court to grant his motion to dismiss. The defendant sheriff and deputy master joined the petitioner in his appeal, but filed no brief in the court of appeals. 575 F.2d 15, 16 (A-2).

In an opinion without dissent, the court of appeals affirmed the district court's order in its entirety. 575 F.2d at 20 (A-11). The court of appeals also found the petitioner a proper defendant because of his six-year-old legislative mandate to establish and enforce minimum standards of confinement for all Massachusetts county institutions, including Essex, and his failure to comply with this mandate. 575 F.2d at 17-18 (A-6).

The petition for a writ of certiorari is not joined by the defendant county commissioners, sheriff or deputy master. The petitioner's motion to the court of appeals for a stay of the injunction was denied.

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[1] References preceded by "A-" are to the appendices to the petition for a writ of certiorari.

[2] Indeed, as noted by the court of appeals, 575 F.2d at 16, 19, 20 (A-2, 8-9, 10), many of the changes ordered by the district court have already been effectuated by the defendant county commissioners, sheriff and deputy master.

B. Factual Background.

The building that comprises the Essex County Jail and House of Correction was constructed in 1815 with an addition in 1884. It houses approximately 88 sentenced prisoners and 25 persons awaiting trial (A-18). In the center of the structure are two rows of cells, back to back, each four tiers high (A-18). Four of the tiers comprise the jail for detainees, the other four the house of correction, where convicts are located. Access to each tier, except the ground floor tier, is by a catwalk (A-18). The cells open out onto the catwalk. Between the catwalks and the outside wall of the building is an open space which runs the full height of the building. The district court found that many of the windows, located in the outside walls, were without glass, covered with dirty plastic sheeting and dirty screens (A-18). Such conditions drastically reduce the amount of sunshine in the cells. 575 F.2d at 16 (A-3).

None of the cells at Essex has either a toilet or running water (A-19). Theoretically, inmates are provided with a two-quart plastic pitcher for water, a plastic wash-basin and a covered plastic bucket for bodily wastes. The district court found, however, that persons are not always issued even these items at the time they are admitted to the facility (A-18, 19). Anyone using the plastic bucket in his cell is visible to persons on the catwalk (A-18). In addition, the district court found that there were several double cells in use, in which there was no privacy whatever (A-18). The three receptacles into which the contents of the plastic buckets may be emptied are all located in the house of correction, and jail inmates must cross over to the house of correction to use them (A-18-19). Only one flush toilet and two sets of shower stalls, each with three shower heads, existed for the entire inmate population (A-18, 19). Certain of the inmates had direct access to the single flush toilet when they were not locked in their cells, but others

were wholly dependent upon the guards to release them from their cell blocks to use the toilet (A-19).

None of the defendants disputed, and the district court found, that all inmates at Essex were subjected to life-threatening fire hazards (A-21). The facility had only two exits, one through the central stairwell and one from the floor level into the exercise yard (A-21). The wooden floors were covered with layers of old paint and, in some cases, flammable floor covering (A-21). Mattresses were either flammable or composed of foam which would exude toxic fumes when ignited (A-21). In addition, the inmates' cells contained a variety of electrical equipment wired from the single light socket in each cell (A-21). All cells must be unlocked individually (A-21). The two existing fire hoses would be useless if there were a fire or extensive smoke in the stairwell (A-21). Evidence submitted to the district court showed that there had been a serious fire at Essex in February, 1975, which destroyed four cells, the foor, and electrical wiring. 575 F.2d at 18 n.4 (A-7 n.4).

Living conditions in the house of correction for sentenced prisoners were largely the same as those in the jail. But the district court found that persons awaiting trial in the jail were locked in their cells, without minimal sanitary facilities, for substantially longer hours than sentenced inmates in the house of correction (A-20). On the issue of lock-in time for detainees, the defendant sheriff asserted that he would willingly provide more out-of-cell time for detainees who were not demonstrable security risks if he had additional supervisory staff (A-20-21).

Reasons for Denying the Petition for a Writ of Certiorari.

A. The Massachusetts Commissioner of Correction is a Proper Defendant in This Case, and the Courts Below Correctly Refused to Grant his Motion to Dismiss.

Since 1972, the Massachusetts commissioner of correction has had a specific and detailed legislative mandate to establish and enforce minimum standards of care and custody for all persons confined in county jails and houses of correction throughout the state. Mass. Gen. Laws c. 127, §§1A, 1B (A-32-34). Since 1972, the Massachusetts legislature has required him to publish rules regarding virtually every facet of life in county facilities, including sanitation and safety. Mass. Gen. Laws c. 124, §1(q) (A-28). See also Mass. Gen. Laws c. 124, §1(d) (A-27). He has a duty to inspect each county institution at least every six months, and county officials must report annually to him. Mass. Gen. Laws c. 127, §§1B, 10 (A-33-34) (AR-1).[3] He is further authorized to furnish consultation services, technical assistance and grants-in-aid to county facilities. Mass. Gen. Laws c. 127, §1A (A-32-33).

At the time this case was heard in the district court and court of appeals, the commissioner had acted in continuous violation of his statutory mandate for over five years. Since 1972, he had not voluntarily promulgated any standards.[4]

[3]References preceded by "AR-" are to the appendices to this brief.

[4]Pursuant to an order of the Massachusetts Supreme Judicial Court, the commissioner had issued emergency regulations regarding discipline and classification in county facilities on August 8, 1977. *Maness et al.* v. *Snow et al.*, No. 226 Civ. (Supreme Judicial Court, June 20, 1977) (AR-2-9). On May 3, 1978, the day following the decision of the court of appeals in the instant case, Hall approved general standards for county correctional facilities. These were promulgated on May 11, 1978. 106 Mass. Register 19-99 (May 11, 1978). Not presently before this Court is the question of the constitutionality of these standards.

The plaintiffs asserted that this dereliction of his clear statutory duty made Hall at least in part responsible for the unconstitutional conditions of their confinement. The court of appeals, noting the commissioner's detailed state law obligations, said that ". . . the Commissioner of Correction has statutory responsibility over precisely the conditions giving rise to the violations." 575 F.2d at 17 (A-5). The court squarely rejected Hall's assertion that he was absolved of liability under 42 U.S.C. §1983 because he had not personally brought about the constitutional violations at Essex, but rather had failed to correct them. *Id.* It is settled law that the Civil Rights Act of 1871 was intended to safeguard against constitutional violations resulting from the dereliction of a statutory duty by a state official as well as to correct those resulting from more affirmative action. *Monroe* v. *Pape*, 365 U.S. 167, 180 (1961). See also *Sims* v. *Adams*, 537 F.2d 829, 831 (5th Cir. 1976) (a supervisory defendant is subject to §1983 liability when he breaches a duty imposed by state or local law and this breach causes the plaintiffs' constitutional injury); *Miller* v. *Carson*, 563 F.2d 757, 761 n.8 (5th Cir. 1977) (that the abuse of authority alleged is a dereliction of duty under state law rather than an affirmative act makes no difference in determining liability under §1983).

As the court of appeals recognized, 575 F.2d at 17-18 (A-5-6), *Rizzo* v. *Goode*, 423 U.S. 362 (1976), cited by the petitioner in his brief at 4, 8-15, is wholly inapposite to the instant case. The court noted in its citation of cases at 575 F.2d at 17 n.2 (A-5 n.2) that post-*Rizzo* courts have consistently found supervisory personnel in positions similar to Hall's to be proper party defendants. As the petitioner concedes in his brief at 13, only two post-*Rizzo* courts of appeals, including

the court in the instant case, and two district courts have even considered the issue of liability of state correctional officials for constitutional violations in county facilities. Contrary to his assertion, these cases were all decided on the not merely consistent but identical theory that the officials' failure to comply with a specific statutory duty was causally related to the constitutional violations alleged. *DiMarzo* v. *Cahill*, 575 F.2d 15, 18 (1st Cir. 1978) (A-5-6); *Miller* v. *Carson*, 563 F.2d 757, 760-761 (5th Cir. 1977); *Lucas* v. *Wasser*, 425 F.Supp. 955, 961-962 (S.D.N.Y. 1976); *Adams* v. *Mathis*, ___ F.Supp. ___ (M.D. Ala. 74-70-S, 2/28/78, slip. op. at 5-6).[5] Compare *Kostka* v. *Hogg*, 560 F.2d 37, 40 n.1 (1st Cir. 1977), where, as the court of appeals noted, 575 F.2d at 18 (A-6), the theory of liability was respondeat superior, not statutory obligation. The dissent from a denial of certiorari in *Lewis* v. *Hyland*, 554 F.2d 93 (3d Cir. 1977), *cert. denied*, 434 U.S. 931 (1977), adds nothing to Hall's argument. In *Lewis*, the district court had found that ". . . any link between responsible officials and the incidents of abuse is necessarily more attenuated here than in *Rizzo*." 554 F.2d at 101.

The commissioner's implication in his brief at 10 n.4 that he has only general supervisory authority over county institutions, or perhaps none at all, ignores the plain wording of his 1972 legislative mandate. Pre-1972 Massachusetts law required only that "[the commissioner of correction] shall have general supervision of jails and houses of correction." 1955 Mass. Acts c. 770, §7. In contrast, the 1972 legislation required him to accomplish numerous specific acts or to see that they were accomplished. Mass. Gen. Laws c. 124, §§1(d), 1(q) (A-27-28); c. 127, §§1A, 1B (A-32-34). Unlike *Rizzo* v.

[5]The fact that these courts use different words to articulate the same theory of law hardly indicates that their decisions are inconsistent, as the petitioner purports to believe in his brief at 13.

Goode, supra at 376-377, there is no dispute in this case that conditions at Essex violated the Constitution. Unlike the supervisory defendants in *Rizzo, supra*, at 375-377, Hall clearly knew or should have known about these conditions, and he had the power and the responsibility to correct them. "We are not confronted with sporadic incidents, over which the Commmissioner might properly claim to have no knowledge or control. Rather, we are dealing with the pervasive failure of responsible authorities to maintain Essex in conformity with constitutional requisites." 575 F.2d at 17-18 (A-5). Unlike *Rizzo, supra*, at 375-377, there is no dispute whatever in this case that Hall has failed to comply with his legal obligations. 575 F.2d at 18 (A-6). The causal link between Hall's refusal to obey state law and the injuries alleged by the plaintiffs and found by the district court in this case is clear.

> Hall is a proper defendant because of his *own* statutory duty and subsequent failure to act (and the consequent constitutional injury) and not on the basis of the act of others. [Emphasis in original.] 575 F.2d at 18 (A-6).

The petitioner suggests in his brief at 8 and 12 that the court of appeals' decision will force a restructuring of relationships between state and county correctional officials. To the contrary, it was Hall's own refusal to comply with his clear state law obligations that necessitated the court of appeals' decision. The structure of relationships between Massachusetts state and county correctional authorities is clearly delineated in a detailed legislative scheme.[6] The petitioner's role in that struc-

[6]The legislative scheme which details the structure of relationships between state and county correctional officials may be found in Mass. Gen. Laws c. 34, §§3, 14 (A-31-32); c. 124, §1 (A-26-29); c. 125, §1 (A-25-26); c. 126, §§1, 2, 11, 16 (A-29-31); c. 127, §§1, 1A, 1B (A-32-34), 10, 97 (AR-1).

ture is set forth with specificity in his 1972 legislative mandate. The court of appeals merely held that Hall could not demonstrate deliberate indifference to his statutory mandate for over five years and be held blameless for the consequences. *Cf. Milliken* v. *Bradley*, 418 U.S. 717, 746-748 (1974) (*Milliken I*); *Milliken* v. *Bradley*, 433 U.S. 267, 289-290 (1977) (*Milliken II*). Both the district court (A-22-24), and the court of appeals, 575 F.2d at 18-21 (A-7-10, 12), carefully considered federalism concerns in the instant case. Their remedy was tailored to correct only the unconstitutional conditions and practices found by the district court. Compare *Rizzo* v. *Goode*, *supra*, at 378-380. If the commissioner finds his official position a difficult one, as he complains in his brief at 8 and 12, that difficulty was created by his own disregard of the Massachusetts legislature's mandate, not by the federal courts.

Since the court of appeals merely held that the commissioner could not ignore a specific, detailed legislative mandate concerning county facilities for over five years and be absolved of responsibility for the consequences, there are clearly no special and important reasons to grant a writ of certiorari to review the question whether the petitioner is a proper party defendant in this case. Supreme Court Rule 19(1).

B. The Decisions of the Courts Below Concerning Fire Safety and Out-of-Cell Time Remedied Constitutional Violations which were Conceded by Essex Officials, which the Lower Courts Found Served No Legitimate Purpose, and which Essex Officials Expressed a Willingness to Remedy.

The petitioner so inaccurately describes the court of appeals' decision in his brief at 14-17 that the second question he presents for review not only suggests no special and important

reasons to grant a writ of certiorari; it is a question that is not even properly presented to this Court. See Supreme Court Rule 19(1).

The petitioner suggests that the court of appeals employed an equal protection standard of strict scrutiny in its approval of the hiring of additional staff at Essex to alleviate the concededly serious fire hazards and to provide more out-of-cell time for detainees. This suggestion ignores the plain wording of the court's holding on this issue:

> . . . many courts have held that pretrial detainees are to be confined only to the degree necessary to guarantee their presence at trial. [Citations omitted.] However, *the district court's order in the present case may be affirmed under even less rigorous standards.* "Restrictions upon detainees that serve no proper purpose, but merely reflect the lack of imagination or energy of local officials, are properly the subject of judicial correction." *Feeley* v. *Sampson* [570 F.2d 364 (1st Cir. 1978)] at 371. [Emphasis added.] 575 F.2d at 20 (A-10-11).

The court noted that the sheriff and jail officials, who are not parties to this petition for a writ of certiorari, had indicated a willingness to allow more out-of-cell time for detainees if provided with additional supervisory staff, and that the district judge had left it to the sheriff's discretion how to use the additional resources to provide more out-of-cell time. 575 F.2d at 20 (A-11). "Given the flexibility of these arrangements, we cannot say that the district court's requirement was, under all the circumstances, unreasonable." *Id.* In affirming the district court's order for increased staff to alleviate life-threatening fire hazards not disputed by any of the defendants and to provide more out-of-cell time for detainees, the court of

appeals thus relied, not on a mechanistic approach, but on the fact that Essex officials were willing to provide more out-of-cell time if they had more staff.

The petitioner erroneously states in his brief at 15 that Circuit Judge Campbell disagreed with the standard employed by the court of appeals in its holding on lock-in time, considering it inappropriately "mechanistic." In fact, Judge Campbell noted in his concurrence that he "would not agree" if the district court or court of appeals had employed a different standard in deciding the issue of lock-in time, not that he did not agree with the standard actually used. 575 F.2d at 20 (A-12). He too noted that "the authorities principally concerned — the county commissioners and sheriff — have not seriously objected on security grounds, or even on grounds of expense, to the district court's order." *Id.* He specifically stated:

> . . . I think it can be fairly assumed that the district court's determination rests on a reasonable and practical view of what can and should be done, in keeping with principles set forth in *Feeley, rather than upon a mere mechanical comparison.* [Emphasis added.] 575 F.2d at 21 (A-12).

The commissioner alone, not the "authorities principally concerned," 575 F.2d at 21 (A-12), with implementation of the district court's order, seeks review of an issue not properly presented to this Court.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix A.

MASSACHUSETTS GENERAL LAWS.

TITLE XVIII.

PRISONS, IMPRISONMENT, PAROLES AND PARDONS.

Chapter 127: Officers and Inmates of Penal and Reformatory Institutions; Paroles and Pardons.

§10. [Annual Reports of Sheriff, County Commissioners, etc.]

Annually, on or before August fifteenth, the sheriffs, county commissioners and the penal institutions commissioner of Boston, shall make a report to the commissioner of the salaries of prison officers, of the number and cost of support of prisoners, and of such other details relative to the management and discipline of the several prisons as the commissioner may prescribe.

§97. [Transfers from and to Correctional Institutions, etc.]

The commissioner may transfer any sentenced prisoner from one correctional institution of the commonwealth to another, and with the approval of the sheriff of the county from any such institution except a prisoner serving a life sentence to any jail or house of correction, or a sentenced prisoner from any jail or house of correction to any such institution except the state prison, or from any jail or house of correction to any other jail or house of correction. Prisoners so removed shall be subject to the terms of their original sentences and to the provisions of law governing parole from the correctional institutions of the commonwealth.

Appendix B.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 77-226 CIV.

ROBERT MANESS ET ALS

vs.

MASTER OF THE PLYMOUTH COUNTY
JAIL AND HOUSE OF CORRECTION
(LINWOOD H. SNOW) ET ALS

Order.

This matter came on to be heard and was argued by counsel, and, as provided in a memorandum filed this day, it is hereby ORDERED that the Commissioner of Correction promulgate rules and regulations concerning "discipline" and "classification" of inmates of county correctional facilities on or before August 8, 1977, and that, if no such regulations are promulgated by that date, those relevant procedures applicable to inmates of State correctional institutions shall be followed by the county defendants as to all persons then held in 23 hour a day lock-up and as to all persons thereafter proposed to be placed in 23 hour a day lock-up.

By the Court, (Wilkins, J.)

JOHN E. POWERS,
Clerk.

Entered: June 20, 1977

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 77-226 CIV.

ROBERT MANESS ET ALS

vs.

MASTER OF THE PLYMOUTH COUNTY
JAIL AND HOUSE OF CORRECTION
(LINWOOD H. SNOW) ET ALS

Memorandum Concerning the Plaintiffs' Application for a Preliminary Injunction.

The plaintiffs are inmates of a correction facility operated and maintained by the County of Plymouth. Each plaintiff has been placed in a 23 hour a day lock-up. Each, respectively, was placed in special confinement on January 4, 1977, March 31, 1977, and April 28, 1977. An agreement as to certain facts, entered into by the plaintiffs and the county defendants, indicates that the plaintiffs are confined to their cells for 23 hours a day; that one at a time each is allowed out of his cell for one hour each day during which he can move along a 100' by 4' catwalk. The plaintiffs have certain restrictions on extra food which are not applicable to other inmates. They are less likely to receive furloughs than inmates in the general population at the county facility. Inmates in the general population are allowed out of their cells for 9-1/2 hours per day and have access to certain recreational facilities. The plaintiffs were told on an informal basis why they were placed in 23 hour a day lock-up. They have not been told how long their special confinement will continue. None was given a hearing, af-

forded counsel, or given an opportunity to confront or cross-examine any accuser prior to his special confinement.

The plaintiffs object to the failure of the county defendants to extend to them certain procedural rights to which they claim they were entitled before they may lawfully be placed in special confinement. They also argue that the defendant Commissioner of Correction (Commissioner) has failed to comply with a statutory requirement that he issue rules and regulations concerning (among other things) "discipline" and "classification" of county inmates. The plaintiffs seek a preliminary injunction directing (1) their release until they are afforded their minimum due process rights, (2) the issuance of county regulations by the Commissioner according to a strict timetable, and (3) the application of the state prison regulations concerning "discipline," "departmental segregation," and "Administrative reclassification" until such time as the county regulations are issued and in effect.

General Laws, c. 124, §1(q), obligates the Commissioner to make and promulgate necessary rules and regulations regarding "discipline" and "classification" for all persons committed to all correctional facilities in the Commonwealth. The Commissioner concedes an obligation to make rules and regulations governing county correctional facilities. In his brief, he refers to such rules and regulations, now in the process of development, as "Minimum Standards for County Correctional Facilities." He expresses an intention to issue those standards in the next four months. However, he is opposed to making a current draft of those regulations available to the court unless they are impounded and is opposed to making them available to counsel for the plaintiffs unless they agree to restrict their use and dissemination. In view of the fact that counsel for the Commissioner contemplates public release and public hearings on the proposed regulations within the next four months, it is hard to understand the Commissioner's reluctance to present

an unrestricted copy of the current draft (in spite of his counsel's statement in open court that a copy would be presented), at least as to matters of "classification" and "discipline". At this time, there is no indication whether the regulations will prescribe any procedures (written reasons, hearings, etc.) concerning circumstances in which county inmates are placed in 23 hour a day lock-up.

The Commissioner argues that the plaintiffs have not been harmed because they cannot show that they have been hurt as a result of the Commissioner's failure to promulgate regulations. Of course, it is true that the plaintiffs cannot demonstrate they have been harmed by the absence of regulations unless those regulations will contain provisions setting forth procedures which must be followed in the process of placing persons such as the plaintiffs in 23 hour a day lock-up. The issue is not whether the plaintiffs should be in 23 hour a day lock-up but whether certain procedures should have been followed as a part of the process by which they were placed in the 23 hour a day lock-up. The county defendants have agreed that each plaintiff received only an informal oral statement of the reason for his special confinement or that the reason for the confinement was obvious in the circumstances. Counsel for the county defendants represented that the plaintiffs were entitled to nothing further because the authorities may change the nature of the plaintiffs' confinement in their unfettered discretion. The Commissioner's counsel has taken substantially the same view.

If, of course, the plaintiffs are entitled to more procedurally, the regulations should deal with those additional rights and the plaintiffs may have been harmed by the unavailability of those additional procedures.[1] The Commissioner's brief

[1] They would be harmed if, as a result of such procedures, their special confinement would never have commenced or would now have been termin-

argues that the regulations would not have to contain any procedures which are constitutionally mandated. This is a surprising suggestion. Minimum standards to be followed surely must be standards at or above the level of constitutional requirements. Any regulations which failed to expound any statutory and constitutional requirements concerning discipline and classification would hardly fulfil the statutory mandate that the Commissioner issue "necessary rules and regulations." Of course, the extent of any constitutional rights (and perhaps statutory rights) may be difficult to determine, but it is better that the Commissioner undertake such an attempt than to leave the matter to officials in each county.

Although the plaintiffs have not demonstrated that they are sustaining irreparable harm because of the absence of any regulations, the Commissioner concedes that he has a duty to issue regulations. In this aspect of the case, the Commissioner has granted that the plaintiffs are entitled to relief but argues that his proposed four months implementation procedure for his regulations should be allowed to stand. In view of the mandate to issue such regulations which has been in effect since 1972, a more expeditious process would appear warranted, at least as to "discipline" and "classification" regulations. In this respect, the case is appropriate for the entry of an interlocutory order finally dispositive of this aspect of the case. Such an order will be entered directing that the Commissioner promulgate rules and regulations concerning "discipline" and "classification" of inmates of county correctional facilities on or before August 8, 1977, and that, if no such regulations are promulgated by that date, those relevant procedures applicable to inmates of State correctional institu-

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ated. On the record now before the Court, it is not possible to determine whether any plaintiff has in fact been harmed by the absence of regulations prescribing procedures.

tions shall be followed by the county defendants as to all persons then held in 23 hour a day lock-up and as to all persons thereafter proposed to be placed in 23 hour a day lock-up.

The question then remains whether the plaintiffs are entitled to preliminary injunctive relief against the county defendants. The plaintiffs argue that they should be released from 23 hour a day lock-up until they are afforded their minimum due process rights. At the most, the plaintiffs would be entitled to the application of due process procedures and not automatic release. A principal consideration is whether the plaintiffs have any statutory or constitutional right to notice, a hearing, a written decision, confrontation, cross-examination, and similar items which, in various contexts, have been grouped under the general heading of procedural due process. Under the Federal Constitution it seems clear that the plaintiffs have no due process rights unless a state statute (or regulation) creates a liberty interest. *Meachum* v. *Fano*, 427 U. S. 215, 228-229 (1976). The Supreme Court has interpreted *Meachum* v. *Fano*, *supra*, as holding "that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events." *Montanye* v. *Haymes*, 427 U. S. 236, 242 (1976).

The plaintiffs cite G. L. c. 127, §41, in support of their claim. Section 41 is concerned with county facilities and the use of isolation units. Certain cells may be "used as isolation units, and for the enforcement of discipline." It is unclear from the statutory language whether such cells may be used only for discipline or whether they may be used, for example, to protect an inmate or to protect others from him. If such a cell is used for discipline, it should not be used "for more than

ten days for any one offence." The defendants argue that 23 hour a day lock-up is not confinement in an isolation unit within the meaning of §41. Certainly the plaintiffs are not totally isolated and have substantially greater privileges than minimally mandated by the last paragraph of §41. The defendants argue in effect that "isolation" in §41 means "solitary confinement" and that clearly the plaintiffs are not being held in solitary confinement. On this preliminary record, the plaintiffs have not established that §41 applies to their circumstances. Moreover, there has been no showing that, if §41 applies to them, the plaintiffs have any right or expectation under §41 that they will not be placed in isolation units. Their claim is that they are entitled to certain precedent due process procedures. Section 41 creates rights and expectations concerning the conditions in isolation units, and it provides that one may not be held there for disciplinary reasons for more than ten days. Thus, §41 provides rights and expectations only concerning conditions in isolation units and concerning the duration of disciplinary confinement, but none concerning transfer to an isolation unit. The plaintiffs have not established that they have any present statutory right to procedural due process before or as part of their being placed in 23 hour a day lock-up.

The plaintiffs have not established that separate procedures for state and county prisoners are without a rational basis. Their equal protection of the laws argument is without merit at this stage of the proceeding. Whether they can show in time that the distinction is without a rational basis remains to be seen.

There is no suggestion that the full bench of the Supreme Judicial Court will take a stricter view than the Supreme Court of the United States of the rights of prisoners, by reaching different conclusions concerning parallel provisions of the Constitution of the Commonwealth. See *Commonwealth* v. *Boyd*,

Mass. Adv. Sh. (1975) 687, 693-694. At this preliminary stage, I decline to impose a stricter standard on the defendants than that imposed by the Constitution of the United States. I conclude that the plaintiffs are not entitled to preliminary relief against the county defendants at this time. This conclusion should not be regarded as a judicial endorsement of the procedures (or lack of procedures) followed by the county defendants. I simply conclude that, at this time, it has not been demonstrated that the plaintiffs are entitled to injunctive relief against the county defendants.

When the Commissioner's regulations are issued, the situation may change. The Commissioner will have to consider carefully any attempt to make his long-delayed regulations concerning "discipline" and "classification" applicable only prospectively. When is ed, those regulations may well apply, and have to apply, to persons such as the plaintiffs.

HERBERT P. WILKINS,
Associate Justice.

June 20, 1977